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TyAnna Herrington
Georgia Institute of Technology

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TyAnna Herrington
Georgia Institute of Technology, USA

Introduction

International trade in intellectual products has increased in recent years, leading to a dramatic rise in the U.S. International Trade Commission's (USITC) caseload (USITC 2012, pp. 20-25). As individuals interact globally through travel and internet access, they also more frequently use and create intellectual products that are accessible on a global scale; thus, nation states' treaty negotiations on intellectual products have an important impact on their own citizenries as well as those of others. When technical communicators author intellectual products they may enter into a process of communicative interaction that leads to self-actualization , the state of having achieved personal potential and satisfied abstract internal desires and drives. The products they create may also be characterized as protected speech in critique and commentary. But in settings where marketing interests are favored over goals to produce products that not only increase profit, but are also useful in a humanistic sense, technical communicators also have the capacity, even inadvertently, to use intellectual products in ways that can inhibit the self-actualization and speech processes of others. At the international level, technical communicators may operate within marketing structures that might even inhibit the rights of those in developing countries whose power to participate in a commodity system may be limited or controlled. (For instance, writers might work to market tourism to an area that could be harmed culturally and environmentally by the presence of visitors outside the natural norm.)

This potential is significant at the international level, in which international intellectual property treaties are regularly created on the basis of market needs, where the "new copyright regime is no longer a law of the public and for the public, but rather, a law of business, for businessmen and investors" (Birnhack 2006, pp. 492). The U.S. Supreme Court, in its *Eldred v. Ashcroft* decision, expanded the market focus even in U.S. domestic law by, in effect, revising the law to commodify intellectual products based in part on a desire to "harmonize" with international trade participants. The Court's revision ultimately bypassed the U.S. constitutional structure that emphasizes access, use, and speech as a bundle of rights provided in the intellectual property

provision to enable individuals' self-actualization (Herrington "International Fair Use?" 2010, pp. 62-63).

When current U.S. law and international intellectual property treaties focus on market needs, the tendency is to ignore human needs. Rather than taking a commodity approach to international intellectual property law, this article advocates a human rights approach. Such a direction springs from the promise in Article 1 of the United Nations' Declaration of Human Rights, that "all human beings are born free and equal in dignity and rights," and Article 19, that "everyone has the right to freedom of opinion and expression; [which] includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." From a human rights perspective, these articles are more important for intellectual property treatment than the more specifically focused Article 27 (2) stating that "everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author" (2012). Thus, I explore this approach aware of what Rajagopal (2006) pointed to as "the uncomfortable fact that the human rights discourse is part of the problem of global hegemony and the absence of global justice" (767). I expect that technical communicators could overcome this problem through a non-hegemonic human rights approach to international intellectual property in which they create intellectual products as tools for human interaction and common problem-solving rather than for competitive commodity marketing to increase power through monetary gain.

Technical communicators, with increasing frequency, are developing intellectual products for international markets, working with international collaborative partners, and creating work for international clients. Producers in both business and academic arenas should be aware that their choices in how they work, how they teach, with whom they work, what they create, and how their creative products are treated, both legally and ethically, can have significant impact on the economic intellectual property market and on human populations who are affected in international intellectual property exchanges.

Technical communicators work with material that influences understanding, reaction, and action; they can either reflect on or ignore the impact their work has on human actors. A well-developed foundation of exploration in articles treating humanistic directions in technical communication indicates support for a human rights approach in assessing effects of the work technical communicators create. In a recent article, Leake (2012) examined the rhetorical and political effect that *The Lancet* has had on the global stage as a publisher of scientific, media, political, and public documents. He notes that the work in *The Lancet* is "not merely a tool of discovery but a critical rhetorical instrument for social and political change" (p. 142). In 1979 Miller argued in "A Humanistic Rationale for Technical Writing" that technical communication is based in humanistic concerns. Dragga and Voss (2001), in "Cruel Pies: The Inhumanity of Technical Illustrations" considered the impact of visual rhetoric in functional documents such as medical charts, and police, insurance, and government reports, noting that "[a]gain and again in such visual images people are deprived of their humanity and objectified for purposes of statistical manipulation" (p. 269). They asked that technical communicators acknowledge responsibility for the work they create. Longaker (2006) pointed to the effect that technical communicators can have on the economy in their local communities, while Diaz admonished technical

communicators to be aware of how to protect their intellectual property interests in international venues. Kienzler (2001) asserted in "Ethics, Critical Thinking, and Professional Communication Pedagogy" that technical communication instructors have an obligation to ensure that students learn their ethical responsibilities for producing work that can have an impact on those who use it. In addition, both the Association of Teachers of Technical Writing (ATTW) and the Council of Programs in Technical and Scientific Communication (CPTSC), the field's major national organizations, have included humanistically focused agenda in conference and committee interactions. The work and guidance from research and interactions in technical communication illustrates that technical communication scholars and instructors not only acknowledge that technical communicators' intellectual products create societal impact, but assert technical communicators' responsibility for producing work that results in no negative humanistic results. I suggest as well, that technical communicators' influence and responsibility on human rights reach beyond local to international venues.

In this article I examine how intellectual products are treated in international intellectual property law and suggest a substitution for the current market-based legal structure that can be harmful to international treaty signatories with limited or no bargaining power. I argue that participants in intellectual product exchange in international venues should consider a human rights approach.

This article considers a number of significant issues, but separate aspects of international intellectual property law are sufficiently complex to require book-length treatment. As such, I examine conflicts in international intellectual property issues broadly rather than in specific detail. I provide a foundation by explaining the conceptual structure behind U.S. law, which points to humanistic aspects of both domestic and international intellectual property law. The controlling characteristics of law and treaties applicable to the international body of signatories is significant to the broader conceptual issues that I explore; thus, I examine those as a whole rather than focusing on the more specific effects of multiple regional treaties. I also mainly treat copyright because this form of intellectual product protection is prevalent among technical communicators and is also significant in treating characteristics of human rights support that are embodied in the U.S. copyright law and its relation to the Constitution. I begin by noting the significant connection between the conceptual structure of a constitutionally balanced U.S. copyright law and an international intellectual property law that would support human rights goals.

Foundations

In my prior writing, presentations, and teaching I have argued that the U.S. Constitution's intellectual property provision embodies the highest aspirational tools for supporting democracy, egalitarian interaction, and self-actualization. It embraces the United States' mission statement, that all its citizens should be supported equally, with equal access to information, in their efforts to reach their potential through a process of national interaction that allows each person to strive for meaning and significance.

The U.S. Constitution's intellectual property provision states:

> The Congress shall have the power . . .to promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries (U.S. Const., art. I, § 8, cl. 8).

As I've explained in more detail in other work ("Copyright, Free Speech, . . ." 2011), this clause makes clear that the Constitution's primary goal is to support knowledge creation, learning, education as a basis for democratic interaction. It is this policy goal that makes democracy possible. As a result, the policy also implicates free speech, news reporting, civil rights, and the basic human right to be supported in creative efforts that lead to a meaningful life. All this is structured within the Founders' broad and lyrical stroke in the Declaration of Independence, pronouncing that each individual has a right to pursue happiness.

To help make policy goals possible, the intellectual property provision provides an incentive to authors and inventors to encourage them to produce their work. The incentive created by protecting authors' work for economic benefit enables them to create new work to which others may respond, in turn, enabling progress in knowledge development and product innovation. Although less treated, yet important, the incentive also provides a means for authors to participate in democratic interaction by supporting their development of forms of expression that operate as participatory speech [see also Helfer (2007)]. As Jürgen Habermas (1968) noted, communication and its access is essential for participation in society and is a means to avoid others' political domination (*Toward a Rational Society,* p. 81). Habermas (1984) asserted that individuals who have access to communicative interaction in society also construct it (*Theory of Communicative Action,* p. 331).

In U.S. copyright law, which is required to reflect constitutional intent, the fair use provision in the 1976 Copyright Act, still controlling law today, is a guiding structure for how to provide access to intellectual products to further democratic interaction and thus, humanistic goals. Under copyright's fair use, intellectual products that are otherwise restricted from use by those without a license, may nevertheless be allowed access, copy, and use. These actions are consistent with educational purposes including teaching, scholarship, and research, support free speech interests in criticism and commentary, and provide a means for news reporting, and can act as speech in forms such as parody. This use is not supported without limits, so creators and users must reach a balance to allow use for humanistic needs without destroying incentives for authors. [See Patterson's (1887) impressive treatment in, "Free Speech, Copyright, and Fair Use" and Herrington (1998), "The Interdependency of Fair Use and First Amendment," written for an audience without extensive legal background.]

When a system ensures a balance of access and protection that allows intellectual products to be used as a means for communicative interaction, it succeeds in giving egalitarian power to both weak and strong parties. A structure such as the Constitution's intellectual property provision, when followed as intended, does so on the basis of policy that satisfies human needs. Its processes may be complex, but its outcomes advance humanistic interests.

The trend in U.S. intellectual property law, however, has taken a contrary turn. Even within a constitutional structure that should prohibit it, domestic U.S. intellectual property law is

employing a system now much more like that of international intellectual property law, which characterizes intellectual products as commodities rather than means to participate fully in democratic or humanistic interaction. Commercial trade has dominated interactions with intellectual products in the global arena. In fact, as Crowne (2011) explained, the history of WIPO (World Intellectual Property Organization) and GATT (General Agreement on Tarifs and Trade), showed that the U.S. and other powerful developed countries furthered their interest in inhibiting counterfeiting and protecting their markets rather than developing fair world markets. Others have noted, regarding various international intellectual property negotiations, that powerful countries have asserted interests in commercial over humanistic goals. Within the GATT forum, in which the Trade-Related Aspects of Intellectual Property Rights treaty (TRIPS) was created, the U.S. used "a coercive trade-based strategy, threatening trade sanctions and the denial of trade benefits for countries whose IP regimes were deemed unacceptably weak" (Abdulqawi (2008) p.13, in Crowne (2011)). Woods (2002) pointed to the ". . . inadequacies of the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS Agreement) and in protecting indigenous knowledge and biological resources" (p. 125), and Tutu (2011) asserted that "[i]t is not a stretch to state, as a general proposition, that intellectual property generating countries have benefitted from TRIPS far more than developing countries" (p. 152).

Certainly, technical communicators in business and academic workplaces are directly affected by the systems in which they work. And because they produce intellectual products and interact in their workplaces with intellectual product development, they also affect others with the work they create. As I noted above, ethics and the consideration of the impact of technical communicators' work on human rights and the responsibility to respond to it have long been core themes in the field. Both the CPTSC and ATTW include committees on ethics, international communication, and diversity initiatives, among others pointing to acceptance of responsibility for the impact of the work technical communicators undertake in both domestic and international venues. Technical communicators play important roles in developing work that contributes to democratic interaction locally, and may produce work that influences human rights globally. As such, technical communication scholars, educators, and practitioners will likely find it important to consider how to respond to humanistic issues in international intellectual property law in work on university campuses and at other workplace venues.

Connection between U.S. IP policy and international IP issues

This preceding explanation of U.S. law is useful as a way to discuss issues at the intersection of intellectual property and international law while also considering the impact of the treaties that control intellectual products' treatment in the global arena. My work in U.S. intellectual property law has been strongly supportive of balanced access to others' intellectual products as a means to ensure that democratic interaction might still survive against the onslaught of access-restrictive laws that have been introduced into domestic intellectual property interactions in recent years. Passage of the Digital Millennium Copyright Act, the Copyright Term Extension Act, and attempts to pass SOPA and PIPA, have intentionally imposed greater restrictions on access to copyrighted work, even to the extent that in many cases fair use provides no antidote, and thus, no constitutional balance. Ultimately these restrictions hinder democratic and humanistic interaction. [Detailed discussion of these Acts is outside the realm of this article.] But despite the need for fair use in U.S. domestic law, I have discovered that a fair use type of structure at the

international level might hinder humanistic results more than aid them. Although Okedeji (2000) and Birnhack (2006) forwarded interests in providing fair use in international venues, I concluded, after exploring further, that the prevalence of powerful nation-states participating in commercial trade-based treaties with developing states with non-commodity interests in their intellectual products would create a power imbalance in which fair use could easily be wielded to take advantage of less powerful treaty signatories (2011, "International Fair Use?").

Under U.S. law, when the Framers' structure is intact and followed as intended, fair use would operate effectively to further non-commercial goals present in the controlling policy of the Constitution. When followed as intended, the U.S. constitutional framework reflected in fair use achieves humanistic goals. But, as I noted above, the trend in domestic U.S. law is to bypass the humanistic intent of constitutional intellectual property law, and pointed market-based goals in international intellectual property treaties lack controlling policy to ensure humanistic goals. [See Conway (2009), Powell and Perez (2011), Hindman (2006), and Ramani (2001)]

At international levels, the Universal Declaration of Human Rights (UDHR) is intended to support humanistic goals similar to those that the U.S. Constitution's fair use was established to provide: free speech support, egalitarian democratic interaction, and creative pursuit of participation for molding a population's future. The UDHR, in its preamble, provides that international force be given in asserting that "the inherent dignity and . . .the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world." It underscores the necessity for a world "in which human beings shall enjoy freedom of speech and belief and freedom from fear," and demands that international interactions not undermine "the dignity and worth of the human person and" . . . "the equal rights of men and women," as well as having "determined to promote social progress and better standards of life in larger freedom." But the UHDR is not controlling law like the U.S. Constitution is designed to be in our domestic realm. Rather, the UDHR is policy that influences international interaction by consent of its actors. Weaker actors who might be harmed by imposition of international intellectual property treaties cannot demand that UDHR policies be enforced. The UDHR is not a dominant policy force in international law. In fact, as a result of U.S. interaction in international law, U.S. law has diminished its own humanistic slant and now shares common characteristics with international intellectual property law. International intellectual property law treaties were developed to consider transfer and use of intellectual products predominantly from a market perspective; more frequently, as reflected in the Supreme Court's decision in *Eldred v. Ashcroft* (2003), which upheld the Copyright Extension Act and effectively eliminated the greater portion of a public domain; in part, to "harmonize" U.S. law with European law, U.S. domestic law is beginning to follow suit.

International intellectual property law derives from consent and participation of nation-states and international organizations or courts can be given control to create binding law (Fischer 2012). The World Intellectual Property Organization (WIPO) is the specialized agency within the United Nations (UN) that acts on a "mandate to administer intellectual property matters recognized by the member states of the UN" (World Intellectual Property Organization). After becoming a part of the World Trade Organization, participating member states entered into the Berne Treaty that governs copyright issues. The Trade-Related Aspects of Intellectual Property

Rights treaty (TRIPS) controls intellectual property in all forms for WIPO members. The Universal Declaration of Human Rights, which functions today in conjunction with other intellectual property treaties, was not considered during these treaty negotiations. In fact, "the UDHR itself was not originally intended to be binding, although it spawned a number of binding treaties, including the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights that were both adopted in 1966 and entered into force in 1976. Although together, these instruments and the UDHR are considered the 'International Bill of Human Rights'" (Fischer 2012), again, members accept the policies in these treaties by consent rather than legal mandate.

The Role of International IP Treaties in Perpetuating Asymmetrical Trade Relationships in the World

It is significant that intellectual property treaties have been negotiated more powerfully by developed than developing countries, in that the interests of developed countries are prominently represented. For instance, during the TRIPS negotiation, "[t]he Ministers emphasized the 'importance of reducing tensions in [the area of intellectual property] by reaching strengthened commitments to resolve disputes on trade-related intellectual property issues through multilateral procedures.' One commentator rightly views this statement as an implicit reference to the unilateral coercion mechanisms employed by the United States" (Crowne 2011, p. 88). The result was that in TRIPS treaty negotiations "There remained a wide gap between developed and developing countries. . ." (Crowne 2011, p. 90).

Without the force of law, policing violations against developing countries' interests and imposing the UDHR's guidelines on more powerful countries is problematic. Some argued that because international intellectual property law integrated the UDHR into WIPO, Berne, and TRIPS, no change to international intellectual property law is needed. Yet, in contrast to the balance provided in a U.S. framework—one that maintains primary constitutional commitment to humanistic knowledge creation that would ensure egalitarian participation in democracy, free expression, and pursuit of happiness—WIPO, Berne, and particularly TRIPS, support commercial interests above all. And authors note the conflict between human rights and intellectual property rights (Foster 2008, p. 201, Simon 2005, p. 1640, and Ramani 2001).

Shaver and Sganga (2010) contended that "[i]t is well established in human rights law that intellectual property rights are not themselves human rights. Rather, IP protections are a policy tool designed to serve specific social purposes. To the extent that these rules conflict with fundamental norms of human rights law, the IP rules must be adjusted" (pp. 650-651). But nation-states abide by the UDHR by consent and if they find that adjusting their desires to accommodate its guidelines is not in their best interests, there is nothing in international intellectual property law to guarantee compliance.

Difference in interests and imbalance of power among international entities affected by intellectual property treaties

A purely commodity valuation of intellectual products can lead to unfair treatment of those less powerful creators whose products are more significant to them as cultural symbols or mechanisms than as commodities. Although I am unaware of specific case conflict recorded in

this area, exploring the Democratic Republic of Congo's Luba peoples' *lukasa* as an intellectual product provides a helpful means to illustrate the difficulty in valuing cultural expressions based on western intellectual property constructs. *Lukasas*, often described as "memory boards" (Primary Source 2013), are carved wooden artifacts that display raised detailing and are often covered with multi-colored beads and/or shells. "They are at once illustrations of the Luba political system, historical chronicles of the Luba state, and territorial diagrams of local chiefdoms. Each board's design is unique and represents the divine revelations of a spirit medium expressed in sculptural form" (Metropolitan Museum of Art 2013).

The *lukasas* as objects may appear to be merely works of art, valuable in their tangible form. But most meaningful to those who create and use them, they are highly functional mnemonic devices that the *mbudye*, the Luba's councils of men and women, use to further political and cultural force within the cultural organization. The *mbudye* "read" the *lukasas* as a source of cultural and political history of its people and "as authorities on the tenets of Luba society, *mbudye* provide a counterbalance to the power of kings and chiefs, checking or reinforcing it as necessary." "Only those at the apex of the association can decipher and interpret the *lukasa's* intricate designs and motifs" (Metropolitan Museum of Art). And learning to read *lukasas* is rigorous. The *mbudye* undergo long-term education and training to master the process of reading and interpreting them (Primary Source 2013). Significantly, readings do not render static information, but are affected by context and nuance and may legitimately and expectedly change from "reader" to "reader," as the needs and interests of the people adapt, heighten, or reflect new considerations (Clifton 2013).

A *lukasa* could be represented through multiple legal characterizations. The tangible object itself could be considered property, in the same way that a book, a car, or a bale of hay is property. But to the Luba, the *lukasa's* value is not in its tangible form, but in the intangible, functional aspects, as a receptacle of memory for cultural and political history. In this intangible form, its legal characterization could be treated as an intellectual expression that might be protected under copyright law. Nevertheless, treating its expression under copyright is outside the realm of the Luba's actual consideration of the object. Ultimately of greatest importance to the Luba is the *lukasa's* use as a device to render *mbudye* readings. The lack of legal fixity in the readings, neither reproducible nor tangible enough to "contain," could prohibit a characterization that might otherwise lead to copyright protection. And without these protections favoring the Luba, the potential that prohibited and untrained *lukasa* users could violate cultural wisdom and custom through misuse of the tangible form of the product is even greater.

Inherent in the difficulty of characterizing an object such as the *lukasa* through legal means is that of determining where its value resides. Current international intellectual property law ensures that value is commercial. The object itself is commercially valuable. The expression of the readings might be commercially valuable as copyrighted expressions. But the *lukasa's* greatest value to its people is as a cultural and historical tool; and this value is legally unconsidered, leaving its holders vulnerable to its violation. A commercial transaction that would deprive the Luba of its *lukasa* would dispossess it of its artistic representation as a primary level of harm. More damaging would be to eliminate the receptacle of cultural and political history that provides the foundation for Luba life. But the most egregious harm would be that without its

lukasa, the *mbudye* would no longer maintain a mechanism to challenge the powerful governing bodies that would otherwise control all cultural and political decisions affecting Luba existence.

The *mbudye* might be considered to have "authored" their readings and so might connect personal fulfillment and pride to the work they produce. The Luba people, as well, could find satisfaction in a process of interacting and moving their culture further through participation, and in the process, experience self-actualization. "Authored" works are significantly different than rote products because they are representative in nature, are imbued with the thoughts and intentions of their creators, and allow a participatory voice in societal interaction. A technical communicator who must fill out a templated report form likely experiences little connection to the final product as its author, but when he or she produces a mission statement or when a technical communication scholar argues the impact of research results, his or her authorship is also speech, a means to the human right to participate in self-governance. The irony within western intellectual property law is that once a work is considered authored it can be withheld from public use, thus inhibiting the potential for further participation.

More powerful nation states whose interests are focused on commercial rather than human interests like those of the Luba, may use opportunities to wield their power to overcome the cultural interests of weaker parties. Varadarajan (2011) and Phillips (2005) referred to a case in which Loren Miller, who was the director of a California-based company, International Plant Medicine Corporation, patented in 1986 what he claimed was a "new" variety of the ayahuasca plant, which he obtained in Ecuador from a Quechuan tribe of South Americans (Varadarajan 2011, pp. 377-378, Phillips 2005, pp. 416-417, and Fecteau 2012). The South American tribes that use ayahuasca do so as a part of their cultural ritual and secrecy about its whereabouts is part of a tribe's cultural capital. Tribes use ayahuasca to enable hallucinogenic exploration by their members as a means to bind them within the cultural structure and the tribes know how to create hallucinogenic effects when combined with an *MAO* inhibitor for this purpose. It is the ritual use of ayuhuasca rather than the plant commodity that is valued within the tribes that use it.

The treaties whose creation was most influenced by developed countries are used as tools to accomplish commercial purposes. Hamilton (1996) noted that TRIPS, in particular, "imposes a Western intellectual property system across-the-board" that emphasizes individual authorship and strong proprietary rights, to be commodified as goods rather than author expression, to move through processes of trade to generate wealth (pp. 616-617). She called this "freedom imperialism," which supports developed nation-states' power in characterizing intellectual products as goods, much like physical property. Weaker participants on the global stage often value intellectual products on different bases than commercial. The legal structures that support treaties, then, can undermine the non-commercial goals of less powerful entities in the global exchange arena.

Western nation states' legal approach to the product based on its commodity value rather than its culturally symbolic value, essentially forces a cultural organization to commodify what it would not otherwise. In the case of the Quechua, they were attributed with a patent interest with a western valuation rather than acknowledging ayuhuasca's cultural value. From a western perspective, this served the Quechua well, although belatedly. Despite that ayahuasca is also

known to have outstanding medicinal benefits, after stealing and patenting the tribes' "formula," Miller eventually lost his patent when the Patent and Trademark Office reversed it in 1999. Tribal peoples learned very late of his biopiracy; thus, the response was issued after years of Miller's misuse. Had the tribe's interests aligned with western interests in commodity, it would likely have pursued and protected the patent interest immediately after Miller violated it. But non-western interests are often ignored. In that same year that Miller's patent was reversed (1999) the United Nations' Economic and Social Council (ECOSOC), the agency that oversees the UDHR, the International Covenant on Economic, Social, and Cultural Rights (ICESCR) and other human rights conventions, reported that the (WTO) has demonstrated little concern with human rights in relation to developed states' trade practices (Foster 2008, p. 176).

Noting that support for authors' rights is consistent with a human rights approach, some authors pointed out that human rights and intellectual property rights both exist and conflict with each other. Yu asked, how to "alleviate the tension and resolve the conflict between human rights and the non-human-rights aspects of intellectual property protection" (Yu 2007, p. 1078). As he says,

> Human rights are fundamental, inalienable and universal entitlements belonging to individuals and, under certain circumstances, groups of individuals and communities. Human rights are fundamental as they are inherent to the human person as such, whereas intellectual property rights are first and foremost means by which States seek to provide incentives for inventiveness and creativity, encourage the dissemination of creative and innovative productions, as well as the development of cultural identities, and preserve the integrity of scientific, literary and artistic productions for the benefit of society as a whole. (Yu 2007, p. 1079)

The connection between human rights and authorship notwithstanding, ensuring that human rights are upheld in international intellectual property transactions is nonetheless difficult. "The currently prevailing theory of international law (called the 'positivist theory') considers that international law can be created only with the consent and participation of states" (Fischer 2012), which means that the only strongly supported aspect of human rights in international intellectual property law by treaty is the author protection. More troubling is that this aspect often bypasses the human connection to authorship where, in many cases "authorship" is held by corporate entities rather than by human actors. International law does not derive from a human rights base and needs not be justified to a controlling legal power that makes humanistic goals primary. [Arguably human-rights oriented power in the U.S. Constitution has also been severely diminished by encroachment of commercial interests evident in changes to the law in the 1976 Copyright Act, which initiated the legal fiction of corporate authorship, and the more recent *Citizens United* case that created personhood in corporations. However interesting and relevant this discussion is in light of this article's subject matter, it lies outside the focus of work here.]

Sell (2004) claimed that developing countries can find flexibility in TRIPS to accommodate their needs, but she points to *sui generis* treatment as a solution. A *sui generis* approach examines case-by-case situations to determine what would be fair treatment in specific contexts for specific complainants. The assumption is that employing *sui generis* would be effective for societies in which economic growth is not a core value. These communities' goals might include

privacy, continuation of culture, strength to prevent intrusion by others into sacred spaces, religious or cultural rituals, or to protect traditional designs or artistic creations from outsiders. But *sui generis* treatment makes an approach that is amenable to developing countries an afterthought to the controlling international law and provides no satisfactory grounding force for protecting developing countries' interests.

Many scholars such as Benkler (1999) and Boyle (1996), among others including myself, argue that intellectual progress depends on access. But in international venues complexity makes intellectual property choices less clear when the potential benefit from access becomes more urgent as the potential for harm from access also becomes more potent. More than 200 organizations from 35 nations challenged W.R. Grace's patent on the neem tree substances found in India, where it is used as a foundational part of cultural and scientific development (Third World Network). Joseph Stigliz (2005 in Simon) comments regarding TRIPs: "What we were not fully aware of was another danger, what has come to be termed bio-piracy, international companies patenting traditional medicines and foods." · . . "it is not only that they seek to make money from 'resources' and knowledge that rightfully belongs to the developing countries, but in so doing, they squelch domestic firms that have long provided the products" (Stiglitz in Simon p. 1620).

Theorists who value market needs for access to intellectual products indicate that marketing intellectual products at the global level supports innovation and encourages world-wide economic growth (Netanel 1998, pp. 246-247, Sunder, and Hindman 2006), undoubtedly, a valuable goal particularly in light of the unstable economic future humans face early in the 21st century. This argument sounds reasonable, but there are striking differences in synonyms used to describe "property," a product that can be commoditized, and "invention," creative action. Synonyms for "property" include

assets	dominion	claim	inheritance
belongings	holdings	ownership	equity
capital	goods	land	tract
chattels	wealth	proprietorship	worth

Synonyms for "invention" include

creation	discovery	innovation	novelty
design	genius	ingenuity	opus
development	imagination	inventiveness	concoction
brainchild	inspiration	originality	resourcefulness

The term "property" implies a static state of completion, whereas, the term "invention" implies intellectual movement and spark. These differences are significant for technical communicators and other creative developers whose work may culminate in products, actions, or both, in the process of engaging in creative action to produce a product that becomes a tool for interaction and participation. As product producers, technical communicators may be able to increase wealth in a market-based system. As actors, they may be able to participate in influencing the future of

the societies that will determine how they live. Those who create products that are means of participation do both.

Differences in characterizations of "property" and "invention" are also significant for international participants (or potential participants) in the global arena of intellectual property trade and/or development. Those who desire representation through participation in global interaction rather than merely to accumulate wealth, may find that an active process of invention provides a means for that participation. In contrast, using a marketplace structure as a basis of global exchange focuses on property, a source of "dominion," reflected in its synonym, implying control. Non-wealth-seeking participants could effectively be shut out of a structure of international intellectual property law that is based on a market system. Many legal scholars note instances in where this, in fact, is a common occurrence. Sell notes that "Critics of the increasing commodification of what was once treated as the public domain have raised at least six issues of concern: (1) threats to traditional agriculture and food security; (2) abuses of monopoly power; (3) increased dependence on costly commercial agriculture; (4) threats to biodiversity; (5) 'biopiracy;' and (6) questions of benefit sharing" (Sell 2004, pp. 197-198).

Indigenous people in developing countries retain valuable "traditional knowledge" that can take the form of more than material products and which may simultaneously be important to humanistic interests as a means of solving world-affected problems. These include responding to disease that becomes resistant to modern medicine, providing insights for collecting and supporting biological products that could be valuable to health and cultural development, and enhancing life by providing insights of cultural significance in art, music, and other areas of intellectual stimulation. But societies that possess valuable traditional knowledge may profit from inhibiting access and may have no interest in gaining economic benefit from their cultural treasures. Graham and McJohn (2010) cite that for some, literary tools like interpretation and narrative are more important to indigenous groups than legal or economic principles. They argue that it is more important to protect traditional knowledge than to protect the public domain (35). Torsen (2008) speaks to the value of a traditional cultural expression (TCE) and the potential to undermine it when subjected to Western copyright models:

> For a wide range of TCEs, fixing a single iteration in a physical format would be antithetical to the very nature of TCEs, which tend to have many similar but not identical manifestations. The New Zealand Maori *moko* provides a helpful example here. The *moko* is, traditionally, body and face markings carved with chisels (now needles) into the skin. Many important rites and rituals are associated with the bestowing of *moko* as the markings indicate status and rank. Notwithstanding the fact that the markings are applied to human skin, a non-permanent canvas: If *moko* were protected under Western copyright law, a single copyrighted iteration of the *moko* designs would necessitate that any subsequent user of those designs would need a license from the copyright holder. This kind of arrangement, antithetical to the communal arrangement currently in place, is an imperfect fit for this kind of TCE. (Torsen 2008, pp. 204-205)

Events in a copyright conflict in Australia are instructive about the problems in treating intellectual products of traditional knowledge in international venues. Carpenter (2005 in Simon)

describes a case in which Bandul Marika, an Aboriginal clan member, was permitted by her clan to use the imagery of sacred works to create her own design, and act as custodian of the sacred image. After her work was displayed by the Australian National Gallery as an educational resource depicting best Aboriginal artworks, she learned that without her knowledge, a carpet company had copied the work and reproduced it on carpets which were offered for public sale. She was subject to sanctions by the clan including expulsion and prohibition from creating more art (Carpenter 2005 in Simon p. 61). Issues like this, involving intellectual products of indigenous people, have been addressed extensively (see examples in Yang (2008), Woods (2002), Tutu (2011), Conway (2009), and Simon (2005), among many others) and provide examples of how developed countries' interests in international intellectual property law can conflict with those of developing countries'.

Like juxtaposing the roles of traders of property in contrast to creative inventors in international intellectual property interactions, technical communicators might find it instructive to contemplate the roles they assume in their domestic and international communities. Technical communicators may author works for employers as a part of their regular course of duties at their jobsites. Within these circumstances, their creative products could be determined works for hire under copyright law. As such, technical communicators' employers would be considered authors for purposes of allocating the copyright to the product. These products would represent employers rather than the technical communicators who created them and employers would control the products as well as the intangible intellectual property rights to use, reproduce them, publish them, prohibit publication, create derivative works from them, or transfer rights to them. In this capacity, technical communicators produce products for sale or use by employers, but connect little with their own public representation; their works less likely, then, reflect their beliefs and contributions to society. The products are commodities, subjects of market interests, rather than personal tools used to participate in shaping society. Technical communicators may also author work through their own drive to create, solve problems, or participate in societal interaction by presenting opinions or questions that add to a conversation. Their authored works would be representative, a means for speech, public interaction, and participatory influence in society. At the core, this form of authorship would support self-actualization, interaction, and invention. Creative development of this kind would lead to a process of creative participation, allowing room to consider goals that meet all participants' needs.

Ideally, technical communicators and other creators would pursue invention to develop products that represent their authors, are meaningful within authors' societies and both respond to societal needs and result in products of value that can be marketed. Technical communicators may consider the broader impact that their own intellectual products could have and may see them as important as a part of a process of accomplishing a cultural goal rather than as items to market and sell.

Aboriginal people provide an example when they create products that are decidedly not static and not meant to be, but instead are used in active ceremonies that are repeated over time. Similar to the Luba peoples' *lukasa,* a painting by an aboriginal artist is not only an artistic product, or a commodity, but a basis of cultural life. The painting may act as a narrative incident of "the dreaming," which Aborigines use to depict the relationship and balance in the spiritual

and natural elements of the physical and spiritual environment. When an image is sold as a creative product rather than retained as a chapter of one part of the story of "the dreaming," it may have less significance. Technical communicators who consider their works as commodities, separate from their function as representations of culture, may eschew the impact that they can have on society. Without consideration of cultural impact, technical communicators are more likely to create the kind of "cruel pies" that Dragga and Voss (2001) describe, remain unaware of the political influence that Leake (2012) describes, and disregard Miller's (1979) admonition to acknowledge the human rights core of technical communication.

Conclusion- Human Rights Approach

Using a human rights perspective to examine intellectual property law leads to understanding that participants' valuation of the products they create or use is inextricably linked to human rights. Foundational to human rights is that individuals are able to participate in their societies through self-governance, supporting a process of self-actualization. Intellectual products in their various forms are often mechanisms that make these essential processes possible.

Intellectual products are already unique in that, by their nature, they are intangible, even when they may be contained in physical forms of expression. When monetized, their value, as protected by western intellectual property law, which controls intellectual property treaties in the international arena, is in the expression itself. The expression is most often traded for monetary symbol, usually in the form of an intangible accounting number. But also in western intellectual property law, there exists a means to prevent use as a right of the holder of the intellectual product license. In this case, the value in the power to prevent use is greater for the holder than the product's symbolic monetary value. As I discussed above, a product's value may reside symbolically in an object of reference such as the *lukasa*, or in cultural knowledge, such as how to combine an *MAO* inhibitor with ayuhuasca to create healing herbs, and even in financial symbols of power in wealth in the numbers following a dollar sign in an accounting column. I suggest that to meet a human rights standard for treating intellectual products at the international level, participants should agree to start by locating value—actual human value rather than monetary—and weighing the use of that value as a means to improve society for all parties. For instance, if value to an indigenous society is in forbearance that makes participatory government and self-actualization possible for its people, then that human right could trump a more powerful participant's interest in accessing and selling a product to create power through monetary symbol. But if a group's secret traditional medicinal treatment were available to cure a race of people, the human right to life could trump the society's interest in its secret.

I suggest that a human rights approach to international intellectual property law would allow both weaker and more powerful participants in global markets to protect and use each others' intellectual products appropriately, and to gain in whatever forms are most important to them without adhering to one dominant structure for defining value as commercial. The global market might progress more fully with encouragement to develop actions and products in response to a need or basis for cultural enhancement rather than merely to dominate a market for monetary wealth alone. If treaties furthered human rights goals over commercial goals, the meaning of authorship in its representative and participatory capacity could be maintained. Product credibility would be connected directly to value rather than power. Moreover, critical speech and

cultural interaction would occur in the process of producing products and generating representative actions that support egalitarian interaction, while benefiting all parties economically, culturally, or in both capacities.

I offer this analysis as a first step to consider an ideal in which the products that technical communicators create could represent technical communicators as reflections of their interests in meeting needs as a means to support humankind rather than merely generating commodities as a way to benefit economically. Producing representative products could accomplish both. If the highest capitalistic gain were attached to producing innovations that meet humanistic needs, the greatest power to benefit economically would be attached to producing products that provide the greatest benefit to humankind. Such products would therefore be developed in a way that supports all producers' and participants' goals to maintain their own cultural lifestyles. Rather than trading in a static world of property and commodity, creators could trade in the dynamic world of invention and innovation. Rather than answering the question, "How do I create the most marketable product and sell it to the greatest number of people for the most money?" technical communicators could benefit more broadly by answering the question "How can I create a product that provides the greatest humanistic benefit and so would be valued at the highest monetary worth?" If a capital market were connected to actual human value rather than market value, a product that could gain economically could also benefit society at a broader level. Ultimately, the products that would have little negative impact on indigenous cultures or ways of life different from those in developed countries would also be those that could gain the most economically. I assert that rather than using a *sui generis* argument only in the case of treating intellectual property issues for indigenous cultures, it would be more profitable to use a human rights approach—assessing value from multiple humanist perspectives—as a basis for examining all international intellectual property claims instead, so that human benefit rather than commodity marketability would provide the core consideration for how intellectual property issues should be treated.

For those who would agree with this proposition, the clear challenge is how to affect a shift in the powerful commodity structure already in place. Small changes may be individual and incremental. I offer this article as a basis for consideration and I speak with others in the intellectual property field to attempt to create influence. In my teaching, particularly in my intellectual property law classes, I make these concerns central to the policy approach I take in dissecting and presenting issues in intellectual property, both in domestic and international partnered classes. But I also acknowledge that I am fortunate to be able to analyze and present these materials in a process of my own self-actualization through my own participation in affecting society, ideas, and ideals. These are my own admittedly minimal first steps that I would not presume to suggest for others, who must choose their own approaches instead. But these steps, in conjunction with those of others, might provide a foundation from which to build a collectively developed platform for a well-functioning solution. A tangible first step could be to lobby for using the UDHR as a requisite basis for international treaties, rather than the commercial basis in TRIPS.

Regardless of what individuals believe about whether or how to incite change in how to treat intellectual products, technical communicators—whether in work for themselves or for an

employer—depict themselves in what they create. Their creative products personify them and affect not only themselves, but also those around them. At minimum, being cognizant of their work's influence might cause them to reconsider whether they should treat their work as commodities, or instead as portrayals of themselves. Technical communicators are responsible for the products they create and their intellectual products are a part of their human legacy. In international venues such work truly affects the world. They must ask themselves, then, in considering the impact of their internationally marketed intellectual products, would supporting a human rights approach to international intellectual product development provide an opportunity to choose their impact on the world? In determining this answer, technical communicators might also be creating their global legacy.

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